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IN THE

Supreme Court of the United States

TRANSCLEAN CORPORATION, et al.,
Petitioners,

v.

JIFFY LUBE INTERNATIONAL, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	2
I. THE QUESTIONS PRESENTED WERE PRESSED AND PASSED UPON BELOW	2
II. THE CIRCUITS ARE SPLIT OVER THE REQUIREMENTS FOR JUDICIAL ESTOPPEL	4
A. Application To Questions Of Law	5
B. Success Requirement	7
C. The Issues Are Important And The Lower Courts Are In Need Of Guidance	8
III. THE COURT SHOULD RESOLVE THE SPLIT OVER THE AUTHORITY TO REVERSE A JUDGMENT WITHOUT A CROSS-APPEAL	8
CONCLUSION	10

The Rule 29.6 Statement appears at Pet. ii.

TABLE OF AUTHORITIES

	Page
CASES:	
1000 Friends of Md. v. *Browner*, 265 F.3d 216 (4th Cir. 2001)	5
Alternative Sys. Concepts, Inc. v. *Synopsys, Inc.*, 374 F.3d 23 (1st Cir. 2004)	8
Archer v. *Warner*, 538 U.S. 314 (2003)	3
Bowles v. *Russell*, 127 S. Ct. 2360 (2007)	10
Burnes v. *Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002)	6
Clay v. *United States*, 537 U.S. 522 (2003)	10
Emergency One, Inc. v. *Am. Fire Eagle Engine Co.*, 332 F.3d 264 (4th Cir. 2003)	5
Forney v. *Apfel*, 524 U.S. 266 (1998)	10
Gardner v. *Bonestell*, 180 U.S. 362 (1901)	6
Hall v. *GE Plastic Pac. PTE, Ltd.*, 327 F.3d 391 (5th Cir. 2003)	6
Johnson v. *Lindon City Corp.*, 405 F.3d 1065 (10th Cir. 2005)	5
Keokuk & Hamilton Bridge Co. v. *Ill.*, 175 U.S. 626 (1900)	6
Lawrence v. *Chater*, 516 U.S. 163 (1996)	10
Nat'l Bank of N. Am. v. Assocs. of Obstetrics & Female Surgery, Inc., 425 U.S. 460 (1976)	3
New Hampshire v. *Maine*, 532 U.S. 742 (2001)	*passim*
United States v. *Villagrana-Flores*, 467 F.3d 1269 (10th Cir. 2006)	5, 6
Urbania v. *Central States. SE & SW Areas Pension Fund*, 421 F.3d 580 (7th Cir. 2005)	6

TABLE OF AUTHORITIES—Continued

	Page
Verizon Commc'ns, Inc. v. *FCC*, 535 U.S. 467 (2002)	2
West v. *Gibson*, 527 U.S. 212 (1999)	3
Zapata Indus. v. *W.R. Grace & Co.*, 536 U.S. 990 (2002), *dismissed per stipulation*, 537 U.S. 1025 (2002)	9
RULES:	
Fed. R. Civ. P. 8	9
S. Ct. R. 29.6	i

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REPLY BRIEF FOR PETITIONERS

Respondent Jiffy Lube fails to dispel the need for certiorari on the issues that the Federal Circuit actually addressed and resolved and that are presented in the petition. Jiffy Lube does not and cannot argue that those issues were waived, for they were expressly pressed and passed upon below. Instead, Jiffy Lube's principal argument against certiorari is that it might eventually prevail on the "alternative basis," Opp. 1, that Transclean purportedly waived opposition to Jiffy Lube's claim preclusion defense. This argument was *not* a ground for the decision below and is no reason to deny certiorari. To the extent the Federal Circuit has not already resolved it adversely to Jiffy Lube, that alternative argument would be for that court to resolve on remand following reversal of its erroneous holdings on judicial estoppel.

It is not surprising that Jiffy Lube trains most of its fire on an "alternative" ground, because it cannot credibly dispute that the circuits are divided on the requirements for judicial estoppel. The circuit splits are both longstanding and recognized by courts (including the Federal Circuit in this case) as well as commentators. Moreover, contrary to Jiffy

Lube's contention, they have persisted after this Court's decision in *New Hampshire* v. *Maine*, 532 U.S. 742 (2001).

On the other question presented—whether a court of appeals has jurisdiction or discretionary authority to reverse a judgment to the benefit of a party that filed no appeal or cross-appeal—Jiffy Lube remains mute. In the court below, however, Jiffy Lube argued the point at length, contending (wrongly) that the Federal Circuit properly reversed the default judgments. Jiffy Lube now sings a different tune—most likely because it cannot argue against certiorari on an issue over which the circuits have been divided for decades and on which the Court granted certiorari once before. But that strategic decision should not prevent the Court from considering the issue. Indeed, the very reason the Federal Circuit erred was because it had no party before it urging reversal. Rather, as it has in the past, the Court can appoint an amicus to present the other side if Jiffy Lube does not.

ARGUMENT

I. THE QUESTIONS PRESENTED WERE PRESSED AND PASSED UPON BELOW.

Jiffy Lube does *not* argue that any of the questions presented in the petition have been waived. And for good reason. This Court may consider any question "'pressed or passed upon below.'" *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) (citation omitted). Each of the questions in the petition was expressly passed upon by the Federal Circuit (albeit *sua sponte*) and each was expressly pressed by Transclean at its first opportunity, which was its rehearing petition. *See* Pet. App. 12a-14a, 15a-16a; Pet. 8-9. Thus, each of the questions is cognizable by the Court and Jiffy Lube does not credibly argue otherwise.

Instead, Jiffy Lube contends that there is an "alternative basis" for ruling in its favor. Opp. 1. It contends that Transclean allegedly waived its objection to a holding that Bridgewood and Jiffy Lube are in privity for claim preclusion purposes. *Id.* at 9-12. This is an alternative ground because

the Federal Circuit did *not* hold that the objection was waived but rather held that Transclean was judicially estopped from asserting it.[1] But this alternative ground is no reason to deny certiorari. This Court resolves numerous cases on the merits despite potential alternative grounds for affirmance, without those grounds precluding certiorari. Rather, the Court's nearly universal practice is to leave such arguments for remand, particularly where, as here, the lower court did not opine on them and they are not within the scope of the questions presented.[2] That includes assertions, like Jiffy Lube's, that a party has allegedly waived an argument that would need to be decided in the event of a remand. *See, e.g.*, *Nat'l Bank of N. Am.* v. *Assocs. of Obstetrics & Female Surgery, Inc.*, 425 U.S. 460, 461 (1976).

There is no reason to depart from that practice here. The Federal Circuit decided the judicial estoppel issues without opining on the alternative waiver argument, and this Court should thus do the same. Indeed, even Jiffy Lube admits that the Court can "address[] estoppel first" before reaching the waiver argument. Opp. 11. The Court should follow its normal practice and leave that issue for the Federal Circuit to resolve on remand (if it has not already done so) after reversal on the questions that were actually decided below.

In light of the *actual* record, there would be ample basis for the Federal Circuit to reject Jiffy Lube's waiver argument.[3]

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[1] In fact, the Federal Circuit implicitly *rejected* Jiffy Lube's waiver argument when the court held that Transclean *had* sought to raise its privity objection but was estopped from doing so.

[2] *See, e.g.*, *Archer* v. *Warner*, 538 U.S. 314, 322 (2003) (declining to reach alternative grounds where "the Court of Appeals did not determine the merits of either argument, both of which are, in any event, outside the scope of the question presented and insufficiently addressed below"); *West* v. *Gibson*, 527 U.S. 212, 223 (1999) (declining to address alternative grounds because "[t]hese matters fall outside the scope of the question presented in the * * * petition for certiorari") (citation omitted).

[3] To assert trial court waiver, Jiffy Lube disingenuously

As Jiffy Lube itself recognizes, waiver is a "discretionary doctrine." Opp. at 10, 11. Given that fact, the record below, and the fact that Transclean unquestionably clarified its privity objection prior to decision, *id.* at 8, there would be no sound reason for the Federal Circuit to find waiver in the event Jiffy Lube persists in raising that argument on remand.

II. THE CIRCUITS ARE SPLIT OVER THE REQUIREMENTS FOR JUDICIAL ESTOPPEL.

When it addresses the *actual* questions presented, Jiffy Lube has very little to say. On judicial estoppel, its principal argument is that "[n]o split currently exists" after this Court's decision in *New Hampshire*, because that decision "has introduced uniformity into the general principles of judicial estoppel." Opp. 1, 14. That assertion is just plain wrong. *New Hampshire* did nothing to resolve either of the splits identified in the petition.

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ellipsizes Transclean's summary judgment brief. Transclean unsuccessfully asserted privity for *issue preclusion* purposes. But when it came to *claim preclusion*, Transclean stated that although Bridgewood and Jiffy Lube were in a form of privity "as a result of their relationship as manufacturer and user of the T-Tech devices," claim preclusion was *not* warranted because "neither entity exercises control over the other, nor has either entity financed or controlled the defense of the litigation against each other." Fed. Cir. J.A. at A671 n.3. Although the petition accurately quotes this language, Pet. 4-5, Jiffy Lube's opposition brief omits the key words. *See* Opp. 6. Likewise, Jiffy Lube points to one passage in Transclean's opening appeal brief, but neglects to mention that four pages later in that same brief Transclean expressly reasserted its argument that "*Bridgewood and [Jiffy Lube] are not 'sufficiently related,' * * * for claim preclusion to apply under the general law of judgments*" because although they "are in privity as a result of being the manufacturer/seller and users, respectively, of the T-Tech Device, they are otherwise independent entities" given that "[o]ne does not exercise complete control over the others and neither * * * financed or controlled the other's defense." Transclean Opening Fed. Cir. Br. 29 (filed Dec. 30, 2005) (emphasis added).

A. Application To Questions Of Law.

One need look no further than the Federal Circuit's opinion in this very case to disprove Jiffy Lube's assertion that "[a]fter *New Hampshire*, the circuit split * * * on the application of judicial estoppel to questions of law does not exist." *Id.* at 17. The court expressly recognized the ongoing split, noting that "[w]hile some circuits have limited application of judicial estoppel to inconsistent factual assertions, others have applied the doctrine to legal conclusions as well." Pet. App. 13a.

Thus, after *New Hampshire*, the Fourth Circuit has continued to adhere to its requirement that "'the position sought to be estopped *must* be one of fact rather than law or legal theory.'" *1000 Friends of Md.* v. *Browner*, 265 F.3d 216, 226 (4th Cir. 2001) (citation omitted; emphasis added). *See also Emergency One, Inc.* v. *Am. Fire Eagle Engine Co.*, 332 F.3d 264, 274 (4th Cir. 2003). Jiffy Lube notes a cursory prefatory statement in *1000 Friends* that this and other elements are "generally" required, but the court's decisions show that it remains a mandatory requirement.[4] The Second Circuit has likewise continued to adhere to the same rule after *New Hampshire*.[5] Similarly, the Tenth Circuit first adopted that rule after *New Hampshire*. *See United States* v. *Villagrana-Flores*, 467 F.3d 1269, 1279 (10th Cir. 2006); *Johnson* v. *Lindon City Corp.*, 405 F.3d 1065, 1069 (10th Cir. 2005). Although Jiffy Lube points to the statement in *Johnson* that this element is "generally" required, the Tenth Circuit subsequently showed that it is a mandatory requirement. *See*

[4] *See Emergency One*, 332 F.3d at 274 (finding no estoppel because statement "is not a factual assertion for purposes of judicial estoppel; rather, it is a legal argument"); *1000 Friends*, 265 F.3d at 227 (finding no estoppel because, *inter alia*, the assertion was "one of law, not fact").

[5] *See* cases cited at Pet. 12 & n.7. Jiffy Lube points to an *unpublished* Second Circuit opinion, but that opinion has no precedential value, did not discuss or decide the issue, and could not overrule the uniform position of that circuit in published opinions.

Villagrana-Flores, 467 F.3d at 1279 (assertion "is a legal position, not a factual one, and therefore the first judicial estoppel factor has not been satisfied").[6]

By contrast, as Jiffy Lube does not dispute, after *New Hampshire*, five circuits—the First, Third, Seventh, Ninth, and Federal—have continued to take the opposite view that judicial estoppel applies even to assertions on questions of law. *See* Pet. 13-15; *Urbania* v. *Central States, SE & SW Areas Pension Fund*, 421 F.3d 580, 587 (7th Cir. 2005).

The split persists long after *New Hampshire* because, contrary to Jiffy Lube's assertion, Opp. 17-18, *New Hampshire* did not purport to resolve it. That decision says absolutely nothing about the issue. And Jiffy Lube is also wrong when it says that *New Hampshire* involved an assertion on a question of law. The assertion at issue was on the *factual* question of where a boundary line lay in a river. *See, e.g.*, *Gardner* v. *Bonestell*, 180 U.S. 362, 370 (1901) (whether "land in controversy was outside the exterior boundaries of the grant" was a "matter[ ] of fact" and "[n]o proposition of law controlled such findings"); *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U.S. 626, 631-32 (1900) ("Where that [boundary] line divided the bridge was a question of fact").

Finally, as the Federal Circuit itself recognized, the split is squarely implicated by this case. Jiffy Lube does not dispute that this Court has squarely held that privity is a question of

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[6] Jiffy Lube quibbles with whether the Sixth, Eleventh and Fifth Circuits apply that rule. Opp. 19-20. But both the Sixth and Eleventh Circuits have applied their oath requirement *after New Hampshire*. *See* Pet. 13; *see also Burnes* v. *Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002) ("'it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding'") (citation omitted). And the case Jiffy Lube cites as allegedly showing the Fifth Circuit's application of the doctrine to legal assertions, Opp. 20, actually involved an assertion of *fact*. *See Hall* v. *GE Plastic Pac. PTE, Ltd.*, 327 F.3d 391, 398 (5th Cir. 2003) (assertion related to identity of party).

law. *See* Pet. 15-16. And while Jiffy Lube suggests a possible distinction between applying estoppel to pure questions of law and the application of law to fact, Opp. 20—a metaphysical distinction that no circuit has ever adopted—it is free to urge that idiosyncratic position on the merits.

B. Success Requirement.

Jiffy Lube offers no support for its contention that *New Hampshire* resolved the well-recognized circuit split as to whether judicial estoppel can apply where, as here, a party achieved no success as a result of its assertion (*see* Pet. 16-20), much less that the Court resolved the split in Jiffy Lube's favor. To the contrary, the Court applied estoppel in *New Hampshire* not simply because New Hampshire had urged a particular position it later sought to change, but rather because "New Hampshire benefited from that interpretation" by receiving a favorable settlement. 532 U.S. at 752. *See also id.* at 755 ("Having convinced this Court to accept one interpretation of 'Middle of the River,' *and having benefited from that interpretation*, New Hampshire now urges an inconsistent interpretation to gain an additional advantage at Maine's expense.") (emphasis added).

This is exactly the position urged by Transclean here and adopted by the vast majority of circuit courts: that judicial estoppel applies only where a party achieved some actual judicial success from its earlier assertion. Here, Transclean lost on its issue preclusion motion (without the District Court ever making a finding of privity); it lost on Jiffy Lube's claim preclusion motion; and it obviously lost on appeal. In these circumstances, the draconian doctrine of judicial estoppel has no place. *See* Pet. 20-21.

Jiffy Lube's real position is that judicial estoppel ought to apply because Transclean's earlier assertion, even though unsuccessful, allegedly falls within the "heart of the doctrine" which "aims to prevent parties from playing fast and loose with the courts." Opp. 14. That is, verbatim, the position taken by the minority of circuits. *See* Pet. 19-20.

Transclean believes that view is erroneous and that the rule applied in *New Hampshire* is the correct one. But it will be up to this Court, on plenary review, to decide which is right.

C. The Issues Are Important And The Lower Courts Are In Pressing Need Of Guidance.

Finally, Jiffy Lube argues that certiorari should be denied because the doctrine of judicial estoppel as currently applied is so vague and discretionary as to defy any attempt to provide definite guidance to the lower courts. Opp. 16-17. That is reason to grant certiorari, not to deny it. While there are discretionary aspects to the doctrine, the lower courts here are hopelessly divided on two clear legal issues. Jiffy Lube cites the First Circuit's decision in *Alternative Sys. Concepts, Inc.* v. *Synopsys, Inc.*, 374 F.3d 23, 33 (1st Cir. 2004), where the court noted (after *New Hampshire*) that "[t]he contours of the doctrine are hazy" and that "[e]ach case tends to turn on its own facts." The court, however, was identifying this uncertainty as a vice, not a virtue, as have numerous other courts and commentators. *See* Pet. 27-28.

Jiffy Lube nowhere denies the importance of the issues. Nor could it, given their dispositive nature and the high frequency with which they recur in every circuit. The circuit splits are persistent, mature, and irreconcilable, and the Federal Circuit expressly reached and opined upon each of the questions presented. The Court should therefore grant certiorari to resolve the confusion and provide the guidance that the lower courts have been seeking and require.

III. THE COURT SHOULD RESOLVE THE SPLIT OVER THE AUTHORITY TO REVERSE A JUDGMENT WITHOUT A CROSS-APPEAL

On the second question presented—whether a court of appeals may reverse a judgment to the benefit of a party that filed no appeal or cross-appeal—Jiffy Lube's current strategy is to remain silent in the apparent hope that the Court will ignore the issue. That was not its position in the Federal Circuit, however. When Transclean noted the Federal

Circuit's errors on this issue in its rehearing position, Jiffy Lube vigorously defended the Federal Circuit's holding. *See* Jiffy Lube's Response to Combined Petition for Rehearing or Rehearing En Banc 12-15 (filed Mar. 13, 2007). Jiffy Lube argued at length that the court acted properly in reversing the default judgments, asserting that "[t]he real issue is whether the panel had the authority to invoke claim preclusion *sua sponte* in the circumstances of this case. There is no question that it did." *Id.* at 12.

Jiffy Lube now professes a newfound loss for words. That is likely because there is no defense either to certiorari or the merits.[7] Its arguments urging the Federal Circuit to deny rehearing were meritless. It is possible that a court of appeals could reach claim preclusion *sua sponte* where the issue is properly raised by a party that filed a timely appeal or cross-appeal. *But see* Fed. R. Civ. P. 8(c) (requiring special pleading of res judicata defense). But Jiffy Lube cited no case, and Transclean knows of none, holding that an appellate court has either jurisdiction or discretionary authority to reverse a judgment, on that basis or any other, to the benefit of a party that never filed a timely appeal or cross-appeal.[8]

The Court needs no further argument in order to grant certiorari on this question, given that the Court has already done so once before. *See Zapata Indus., Inc.* v. *W.R. Grace & Co.*, 536 U.S. 990 (2002), *dismissed per stipulation*, 537 U.S. 1025 (2002). It would be perverse if the absence of the defaulting defendants in this Court led to a denial of certiorari in a case that warrants it. For the Federal Circuit erred in reversing the default judgments precisely because there was no party before it urging the point. If Jiffy Lube persists in

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[7] Jiffy Lube's alternative waiver argument would not affect this issue, because the issue goes to the court's authority and because the defaulting defendants never appeared to advance a defense.

[8] Transclean tried to explain this to the Federal Circuit in a proffered reply in support of rehearing but that court—at Jiffy Lube's urging—denied leave to file that reply.

its new vow of silence, the Court should appoint an amicus to argue the other side on the merits of that issue. The Court routinely does that when parties (typically the government) confess error in decisions that benefit them. *See, e.g.*, *Clay* v. *United States*, 537 U.S. 522 (2003); *Forney* v. *Apfel*, 524 U.S. 266 (1998). The same procedure should apply where benefited parties have simply elected not to appear at all.

At a minimum, however, the Court should vacate the Federal Circuit's judgment and remand the entire case for further consideration in light of, *inter alia*, *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007). As explained in the petition, *Bowles* does not resolve the circuit split over the cross-appeal requirement. But the new decision in *Bowles* is arguably relevant to the issue and would thus warrant vacatur and remand under the flexible standard applied by this Court. *See, e.g.*, *Lawrence* v. *Chater*, 516 U.S. 163, 167-68 (1996) (GVR appropriate where "an intervening factor has arisen that has a legal bearing upon the decision").[9]

CONCLUSION

For the foregoing reasons and those in the petition, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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[9] Because the Federal Circuit entered only one judgment, vacatur would necessarily apply to that entire judgment. Vacatur would thus require the Federal Circuit to reconsider not only its cross-appeal ruling but also the judicial estoppel ruling that was the basis for its reversal of all claims against all parties.